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ABUCHI NGWOKE v. PP

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
AHMADI ASNAWI JCA
KAMARDIN HASHIM JCA
B [CRIMINAL APPEAL NO: M-05-368-12-2014]
5 APRIL 2016

C ***CRIMINAL LAW:*** *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking in methamphetamine – Conviction and sentence – Appeal against – Evidence of chemist – Admissibility – Whether complied with s. 402B(2)(b) of Criminal Procedure Code – Trial judge's cross-examination of appellant and witness – Whether clouded decision on element of knowledge – Whether appellant had conscious knowledge and mens rea possession of drugs – Whether conviction safe*

D ***CRIMINAL PROCEDURE:*** *Appeal – Appeal against conviction and sentence – Trafficking in dangerous drugs – Evidence of chemist – Admissibility – Whether complied with s. 402B(2)(b) of Criminal Procedure Code – Trial judge's cross-examination of appellant and witness – Whether clouded decision on element of knowledge – Whether appellant had conscious knowledge and mens rea possession of drugs – Whether conviction safe*

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The appellant, a Nigerian, was charged in the High Court for an offence of trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). On 23 May 2012, while on a crime prevention surveillance, SP6 and some police officers had arrested the appellant for breaking into a private property. The appellant was then taken to the hospital where he excreted a total of 29 capsules, which were later confirmed by the chemist, SP3, to contain methamphetamine. At the end of the prosecution's case, the trial judge found a *prima facie* case had been made out. In essence, the appellant's defence was that he had no knowledge that the capsules he swallowed contained dangerous drugs. The appellant submitted that he had come to Malaysia to continue his studies and said that before his departure, he had gone to see a friend, one Chibike, in a hotel room in Lagos. In the said room, he had drinks with Chibike before he became drunk. Chibike had asked him to swallow precious stones to be delivered to Malaysia, which he did. It was further the evidence of the appellant that at the Kuala Lumpur International Airport, he had boarded a taxi where he had an argument with the taxi driver ('SP4') over the wrong destination that SP4 had taken him to and over the fares. SP4 and the appellant then went to the police station where they managed to settle the dispute. The appellant submitted that he was not conscious at the time he was at the police station, and that he had been taken in a patrol car to town. He then had walked towards a building and drank Coca-Cola and slept there overnight. At the end of the trial, the trial judge found that the defence could not be believed and that the appellant's story was an afterthought. The trial judge held that the defence

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had not raised a reasonable doubt on the prosecution's case and failed to rebut the presumption of trafficking on a balance of probabilities. The appellant was thus convicted and sentenced to death. The appellant appealed against the said decision on these grounds that (i) all the written submissions tendered by the prosecution were inadmissible in law as they did not strictly comply with the conditions in s. 402B of the Criminal Procedure Code ('CPC'); (ii) the trial judge had descended into the arena of conflict when His Lordship cross-examined the appellant and SP4; and (iii) there was no *mens rea* possession, alternatively, it was a case of passive possession.

Held (allowing appeal; convicting appellant for offence under s. 12(2) of the DDA)

Per Kamardin Hashim JCA delivering the judgment of the court:

(1) The written statement of SP3, the most important witness, suffered from defect in that s. 402B(2)(b) of the CPC had not been complied with. From SP3's witness statement, there was no declaration that it was true to the best of her knowledge and belief. Further, SP3 did not read her written statement in the open court under oath, her written statement was not marked as an exhibit by the court and the witness statement was not identified by SP3 in the open court during trial. After SP3's witness statement was found to be inadmissible, what was left on record as regards to the evidence of the chemist regarding her analysis on the impugned drugs was that she had received the exhibits from SP14 and that she had found the substance to contain 261.66g of methamphetamine. There was no evidence as to what was the analysis conducted by SP3 before she came to her conclusion. In view of the infirmities in the testimony of the chemist, the charge of trafficking was thus not proved with certainty. (paras 15-23)

(2) The trial judge had descended into the arena of dispute regarding an element of knowledge of the impugned drugs in the 29 capsules swallowed by the appellant. The appellant's defence was that he had swallowed precious stones contained in the 29 capsules. The trial judge, however, had fallen into error in descending into the arena of dispute thereby allowing his judgment of the facts to be clouded by the results of his cross-examination. The trial judge had exceeded the desirable limits of judicial intervention in the examination and cross-examination of the appellant and SP4 notwithstanding the wide ambit of s. 165 of the Evidence Act 1950. The judgment of the trial judge on the issue of knowledge was partly clouded as a result of his cross-examination of the appellant and SP4. (paras 29-31)

(3) Evidence showed that (i) at the time of the arrest the appellant was drinking a bottle of dye; (ii) when he was brought into the hospital and from the evidence of the doctor, the appellant had been in a critical state; and (iii) there was no overt act and no *mens rea* possession in relation

to the place of the offence as stated in the charge which was at the hospital. The trial judge had erred when His Lordship did not view the evidence adduced from these angles. It was doubtful that the appellant had the conscious knowledge that he was in *mens rea* possession of the impugned drugs in question when he was admitted to the hospital. Thus, the conviction for trafficking was not safe. The appellant was therefore convicted under s. 12(2) of the DDA and sentenced to 20 years imprisonment with ten strokes of the mandatory whipping under s. 39A(2) of the DDA. (paras 32-34)

***Bahasa Malaysia** Headnotes*

Perayu, seorang rakyat Nigeria, telah dipertuduh di Mahkamah Tinggi atas kesalahan pengedaran dadah berbahaya di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Pada 23 Mei 2012, semasa melakukan rondaan pencegahan jenayah, SP6 dan beberapa pegawai polis menahan perayu kerana memecah masuk satu premis persendirian. Perayu kemudian dibawa ke hospital di mana sebanyak 29 kapsul dikeluarkan melalui duburnya, yang disahkan ahli kimia, SP3, mengandungi methamphetamine. Pada akhir kes pendakwaan, hakim bicara mendapati bahawa satu kes *prima facie* dibuktikan. Pembelaan perayu pada dasarnya adalah bahawa dia tidak mengetahui bahawa kapsul-kapsul yang ditelannya mengandungi dadah berbahaya. Perayu menghujahkan bahawa dia ke Malaysia untuk menyambung pelajarannya dan menyatakan bahawa sebelum berangkat, dia berjumpa dengan kawannya, seorang yang bernama Chibike, di sebuah bilik hotel di Lagos. Dalam bilik itu, dia minum dengan Chibike sebelum menjadi mabuk. Chibike menyuruhnya menelan batu permata yang akan dihantar ke Malaysia, dan perayu berbuat demikian. Perayu juga memberi keterangan bahawa di Lapangan Terbang Kuala Lumpur, dia menaiki sebuah teksi di mana dia bertengkar dengan pemandu teksi ('SP4') kerana SP4 membawanya ke tempat yang salah dan berkenaan tambang teksi. SP4 dan perayu kemudian pergi ke balai polis di mana pertikaian mereka diselesaikan. Perayu menghujahkan bahawa dia tidak sedar diri semasa di balai polis, dan dia telah dibawa ke bandar dalam kereta peronda. Kemudian dia berjalan ke arah sebuah bangunan dan minum Coca-Cola dan tidur di sana semalaman. Pada akhir perbicaraan, hakim bicara mendapati bahawa pembelaan tidak boleh dipercayai dan cerita perayu adalah fikiran terkemudian. Hakim bicara memutuskan bahawa pembelaan tidak menimbulkan keraguan munasabah ke atas kes pendakwaan dan gagal menyangkal anggapan pengedaran atas imbangan kebarangkalian. Perayu dengan itu disabitkan dan dijatuhkan hukuman mati. Perayu merayu terhadap keputusan tersebut atas alasan-alasan (i) segala hujahan bertulis yang dikemukakan oleh pihak pendakwaan tidak boleh diterima sebagai undang-undang kerana ia tidak mematuhi syarat-syarat s. 402B Kanun Tatacara Jenayah ('KTJ'); (ii) hakim bicara menghadapi konflik apabila hakim bicara memeriksa balas perayu dan SP4; dan (iii) tiada *mens rea* milikan, dan secara alternatif, ia adalah milikan pasif.

Diputuskan (membenarkan rayuan; mensabitkan perayu atas kesalahan di bawah s. 12(2) ADB)
Oleh Kamardin Hashim HMR menyampaikan penghakiman mahkamah:

(1) Kenyataan bertulis SP3 iaitu saksi yang paling penting, adalah cacat kerana s. 402B(2)(b) KTJ gagal dipatuhi. Daripada kenyataan saksi SP3, tiada deklarasi bahawa ia adalah benar daripada pengetahuan dan kepercayaannya. Tambahan lagi, SP3 tidak membaca kenyataan bertulisnya secara bersumpah di mahkamah, kenyataan bertulisnya tidak ditanda sebagai ekshibit oleh mahkamah dan kenyataan saksi tidak dikenal pasti oleh SP3 di mahkamah terbuka semasa perbicaraan. Selepas kenyataan saksi SP3 tidak diterima, apa yang tinggal dalam rekod berkenaan keterangan ahli kimia berhubungan analisanya ke atas dadah-dadah dipersoalkan adalah bahawa dia menerima ekshibit-ekshibit SP14 dan dia mendapati bahawa bahan itu mengandungi 261.66g methamphetamine. Tiada keterangan berkenaan apakah analisa yang dijalankan oleh SP3 sebelum dia mencapai kesimpulannya. Memandangkan terdapat kelemahan dalam testimoni ahli kimia, pertuduhan pengedaran oleh itu tidak dibuktikan dengan kepastian.

(2) Hakim bicara menghadapi konflik berkenaan elemen pengetahuan dadah-dadah yang dipersoalkan dalam 29 kapsul yang ditelan perayu. Pembelaan perayu adalah bahawa dia menelan batu permata yang terkandung dalam 29 kapsul. Hakim bicara, walau bagaimanapun khilaf apabila berdepan dengan konflik dengan itu membenarkan penghakiman faktanya dibayangi keputusan pemeriksaan balasnya. Hakim bicara melangkaui had wajar campur tangan kehakiman dalam pemeriksaan dan pemeriksaan balas perayu dan SP4, meskipun s. 165 Akta Keterangan 1950 mempunyai bidang kuasa yang luas. Penghakiman hakim bicara berkenaan isu pengetahuan dibayangi sebahagiannya akibat pemeriksaan balasnya ke atas perayu dan SP4.

(3) Keterangan menunjukkan bahawa (i) pada waktu perayu ditahan, dia telah minum sebotol pewarna; (ii) apabila dia dibawa ke hospital dan dari keterangan doktor, perayu dalam keadaan kritikal; dan (iii) tiada kelakuan terang-terangan dan milikan *mens rea* berhubungan dengan tempat kesalahan seperti yang dinyatakan dalam pertuduhan iaitu di hospital. Hakim bicara khilaf apabila beliau tidak melihat keterangan yang dikemukakan dari sudut-sudut ini. Adalah meragukan bahawa perayu mengetahui bahawa dia mempunyai milikan *mens rea* ke atas dadah-dadah dipersoalkan itu apabila dia dimasukkan ke hospital. Oleh itu, sabitan atas pengedaran dadah tidak selamat. Perayu dengan itu disabitkan di bawah s. 12(2) ADB dan dijatuhkan hukuman penjara 20 tahun dan diberikan sepuluh sebatan mandatori di bawah s. 39A(2) ADB.

A **Case(s) referred to:**
Leong Bon Huat v. PP [1993] 3 CLJ 603 SC ***(refd)***
Mahdi Keramatviyarsagh Khodavirdi v. PP [2015] 3 CLJ 336 CA ***(foll)***
Teng Boon How v. PP [1993] 4 CLJ 545 SC ***(refd)***

Legislation referred to:
B Criminal Procedure Code, s. 402B(2)(b)
Dangerous Drugs Act 1952, ss. 12(2), 39A(2), 39B(1)(a), First Schedule Part III
Evidence Act 1950, s. 165

For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Nurshafini Mustafha; DPP

C *[Editor's note: For the High Court judgment; please see PP lwn. Abuchi Ngwoke (W/Nigeria) [2015] 1 LNS 798 (overruled in part).]*

Reported by Suhainah Wahiduddin

D **JUDGMENT**

Kamardin Hashim JCA:

[1] The appellant was charged at the Melaka High Court for an offence of trafficking in dangerous drugs. The charge reads:

E > Bahawa kamu pada 23.05.2012, jam lebih kurang 5.00 pagi hingga 25.5.2012 jam lebih kurang 2.50 petang, di Wad Zon Merah, Hospital Besar Melaka, Melaka di dalam daerah Melaka Tengah, di dalam Negeri Melaka, telah didapati mengedar dadah berbahaya jenis Methamphetamine berat bersih 251.66 gram. Oleh itu, kamu telah melakukan kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya
F > 1952 dan boleh dihukum di bawah seksyen 39B (2) Akta yang sama.

The Prosecution Case

[2] Briefly, the prosecution case is as follows. On 22 May 2012 at about 1pm, a taxi driver by the name Wong Yew Teng (SP4) took the appellant from KLIA Sepang to Melaka. The appellant wanted to pay the taxi fares in
G Nigerian currency but was rejected by SP4. An argument broke out between the two whereby the police was called by SP4. SP4 and the appellant were taken to the police station. At the police station with the help of the police, they managed to settle the dispute whereby SP4 accepted 5,000 Naira from the appellant as the taxi fares.

H **[3]** On 23 May 2012 at around 12 midnight, while on his crime prevention round, L/Kpl Mohd Nor Hafzan bin Mazlan (SP6) together with two other police officers went to Batik Selat House, MITC and arrested the appellant for breaking into the said premises. The appellant became more aggressive on seeing the police and he drank a bottle of dye.

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[4] The appellant was then taken to the Melaka General Hospital where he excreted a total of 29 capsules. A

[5] All the 29 capsules were later sent to the chemist, Rozieyati bte Abdullah (SP3) for analysis. SP3 confirmed the powdery substance in the 29 capsules contained methamphetamine as listed under Part III of First Schedule of the Dangerous Drugs Act 1952 (DDA), the subject matter of the charge. B

[6] At the end of the prosecution case, the learned trial judge found that a *prima facie* case has been made out. The relevant findings of the learned trial judge are as follows: C

> 23. Elemen milikan fizikal telah dibuktikan oleh Pendakwaan dengan berjaya kerana secara ketaranya ketulan dadah tersebut adalah dijumpai dan dikeluarkan dari abdomen tertuduh melalui dubur tertuduh sendiri. (lihat kes *PP v. Kung Yang Song* [2010] 9 CLJ 483)
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> 24. Pada hemat saya, Tertuduh mempunyai *mens rea* pemilikan kerana Tertuduh telah mencuba untuk menyembunyikan dadah tersebut di dalam abdomen dengan liciknya untuk mengelakkan dari dikesan. Adalah mustahil bahawa Tertuduh tidak tahu jenis atau sifat sesuatu benda yang sebesar 2 jari tangan dengan bersaiz seperti ubi kentang kecil yang mana dapat dilihat oleh Mahkamah ini daripada bekas plastik kosong yang telah dikeluarkan kandungannya oleh ahli kimia (P13(1-27) dan P14(A-A1)) yang ditelannya dengan mengambil kira faktor keselamatan sendiri. Tertuduh mempunyai pengetahuan mengenai dadah yang ditelannya itu berdasarkan inferens yang boleh dibuat daripada keterangan yang dikemukakan. D E
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> 36. Berdasarkan keterangan SP3, saya mendapati ujian analisis Pertama yang dijalankan oleh SP3 adalah ujian Marquis Test yang merupakan "privilary test" baginya. Oleh itu, semasa analisis melalui ujian warna, kesemua 29 biji ketulan telah dihomogenkan. Maka dalam keadaan ini, penghomogenan telah dilakukan sebelum ujian GCMSD dan ini telah menuruti prinsip dalam kes *Nolose Albert Rleshome v. PP* [2014] 2 MLJ 309 (*supra*). G
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> 37. Di samping itu, saya berpuas hati dengan keterangan yang diberikan oleh SP3 terhadap identiti dadah yang disahkan melalui ujian GCMSD dan berat kesemua 29 biji ketulan yang ditimbang dengan menggunakan mesin-mesin yang mempunyai "calibration certificate" yang sah dan belum tamat tempohnya iaitu P23(A) dan P23(B). Ditambah pula, perbezaan berat timbangan kepada bahan dadah tersebut tidak langsung menjejaskan kes Pendakwaan (lihat kes *Mahkamah Rayuan Gobinath Reddy a/l Gopal lwn. Pendakwa Raya* [2014] 1 MLJ 446). Oleh sedemikian, saya menerima keterangan SP3 tersebut yang telah membuktikan subjek yang dipersoalkan adalah dadah jenis Methamphetamine seberat 251.66 gram. H I
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41. Adalah suatu fakta yang tidak dapat dinafikan bahawa kuantiti seberat 251.66 gram Methamphetamine berbalut plastik yang ditelan oleh Tertuduh tidak dapat dicerna melalui sistem penghadaman perut manusia. Ini telah menyokong anggapan statutori s. 37(da) ADB bahawa Tertuduh membawa jumlah dadah tersebut untuk tujuan pengedaran dan bukan untuk kegunaannya sendiri.

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42. Berdasarkan fakta-fakta yang dibuktikan di atas dan setelah saya menimbangkan keterangan yang dikemukakan oleh Pendakwaan pada tahap penilaian maksimum di akhir Kes Pendakwaan, saya mendapati bahawa Pihak Pendakwaan telah berjaya membuktikan kes *prima facie* terhadap Tertuduh (lihat kes *Balachandran v. PP* [2005] 1 CLJ 85; *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734).

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43. Oleh yang sedemikian, Mahkamah ini memerintahkan agar Tertuduh dipanggil untuk membela diri atas pertuduhan yang dipertuduhkan (P3B).

[7] The appellant was thus called upon to enter his defence.

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The Defence

[8] The appellant chose to give evidence under oath. In essence his defence was that he had no knowledge that the capsules he swallowed contained dangerous drugs. He said that he was a student at Bostonweb

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College of Technology and Management, Kuala Lumpur since 2010. In May 2012, he came back to Malaysia to continue his study in English language at the same college.

[9] The appellant further said that before departure, he went to see his friend, Chibike, in a hotel room in Lagos. In the said room he had a drink

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with Chibike before he became drunk. Chibike asked him to swallow precious stone to be delivered to someone in Malaysia. He swallowed many precious stones given to him by Chibike.

[10] It was further the evidence of the appellant that at the KLIA he boarded a taxi to go to Nilai Lagenda College to meet up with his friend,

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Mr Good Luck, but instead the taxi driver took him to Melaka. He had an argument with the taxi driver over the wrong destination and as well as over the fares. Finally the taxi driver left him at Melaka after he paid the taxi driver 5,000 Naira for the fares.

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[11] The appellant further said that the police took him to a police station. At that time he was not conscious. After that the police took him in a patrol car and dropped him in town. He then walked towards a building which looked like a church to him. He had drank a coca cola (dye) and slept there overnight. The next morning he was arrested by the police and brought to a hospital where he excreted the stones he had earlier swallowed while he

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was in Lagos.

[12] At the end of the trial, the learned trial judge found that the defence cannot be believed. The trial judge further found that the appellant's story about Chibike and precious stones is an afterthought and recent invention. The learned trial judge found that the defence had not raised a reasonable doubt on the prosecution case and failed to rebut the presumption of trafficking on balance of probabilities. The appellant was convicted and sentenced to death.

The Appeal

[13] Before us, learned counsel for the appellant canvassed three following grounds in his submissions:

(i) that all the written statements tendered by the prosecution were inadmissible in law as they did not strictly comply with the conditions in s. 402B of the Criminal Procedure Code ("CPC");

(ii) that the learned trial judge had descended into the arena of conflict when His Lordship cross-examined the appellant and SP4; and

(iii) there was no *mens rea* possession, alternatively, it is a case of passive possession.

Our Findings

[14] We found merits in the arguments of learned counsel in respect of the first ground of appeal. Likewise, we also found merits in the complaint by learned counsel in respect of the second ground. Accordingly, we allowed the appeal. We set aside the conviction under s. 39B(1)(a) of the DDA by the learned trial judge and we substituted a conviction under s. 12(2) of the DDA, punishable under s. 39A(2) of the same Act. After hearing submissions from both parties as regard to sentence, we imposed on the appellant a term of imprisonment of 20 years from the date of arrest and ten strokes of whipping. Our reasons are as below.

[15] As regard to the first ground of appeal, learned counsel argued that the written statement of the chemist (SP3), the most important witness suffers from defect in that s. 402B(2)(b) of the CPC had not been complied with. From SP3's witness statement, we observed that there was no declaration that it was true to the best of her knowledge and belief. Learned counsel argued that this omission is fatal as it is mandatory. Learned counsel relied on the decision of the Court of Appeal in the case of *Mahdi Keramatviyarsagh Khodavirdi v. PP* [2015] 3 CLJ 336 which decision was later affirmed by the Federal Court.

[16] In the above cited case, the Court of Appeal had decided as follows:

> [13] We have perused the notes of proceedings and **we found no indication that SP1 had read out the witness statement**. We further found that the witness statement of SP1 did **not bear**

his signature and neither **did the witness statement contain a declaration as required** under para. (2)(b) of s. 402B of the CPC. Hence, the preconditions set out in para. (2) for the admissibility of the evidence had not been complied with, rendering the witness statement of SP1 inadmissible. Consequently, there was no evidence on the nature or contents and the weight of the capsules. The subject matter of the charge, namely the dangerous drugs, methamphetamine had not been proven. (emphasis added)

[14] The fact that SP1 was cross-examined **cannot derogate from the legal position or the application of s. 402B** of the CPC. As regards the rules of procedure and evidence in criminal law, **no default by the defence and no waiver or admission could be held against him. Any default, waiver or consent cannot supersede the written law** (see *Chah Siew Kok v. Public Prosecutor* [1987] 1 CLJ 386; [1987] CLJ (Rep) 518; *Ooi Lean Chai v. Public Prosecutor* [1991] 2 CLJ 1304; [1991] 1 CLJ (Rep) 337; [1991] 2 MLJ 552; *Alcontara Ambross Anthony v. Public Prosecutor* [1996] 1 CLJ 705; [1996] 1 MLJ 209; *Fan Yew Teng v. Public Prosecutor* [1971] 1 LNS 29; [1971] 2 MLJ 271). The inadmissible evidence of SP1 thus remained inadmissible notwithstanding any waiver or consent by the appellant. (emphasis added)

[17] And now, s. 402B of the CPC provides as follows:

402B (1) In any criminal proceedings, a written statement by any person shall, with the consent of the parties to the proceedings and subject to the conditions contained in subsection (2), be admissible as evidence to the like effect by that person.

(2) A statement may be tendered in evidence under subsection (1) if:

(a) the statement purports to be signed by the person who made it;

(b) the statement contains a declaration by that person to the effect that it is true to the best of his knowledge and belief; and

(c) a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings not later than fourteen days before the commencement of the trial unless the parties otherwise agree.

[18] Following *Mahdi*'s case (*supra*), we agreed with learned counsel that the preconditions in sub-s. (2) must be complied with before the witness statement of SP3 can be admitted as evidence. We also found that as the witness statements of four other witnesses, namely D/Kpl Shafiee bin Ali (SP1 - photographer); D/Kpl Zarinah binti Othman (SP2 - store keeper); SP4; and L/Kpl Mohd Arif Akmal bin Marzuki (SP5 - one of arresting officers) equally did not comply with the same provision of the law, they too, are inadmissible.

[19] On the same first ground of appeal, learned counsel submitted that the oral testimony of SP3 suffers from the following infirmities: A

(i) there is no evidence that the chemist has read the written statement in open court under oath;

(ii) there is no record that the written statement has been marked by the court; and B

(iii) that there is no notation that the chemist has identified her written statement.

[20] Having perused the record of appeal, we found merits in learned counsel's complaint. We found that the chemist (SP3) did not read her written statement in the open court under oath, her written statement was not marked as an exhibit by the court and the witness statement was not identified by SP3 in the open court during the trial. There was an attempt made by the prosecution to refer her witness statement and to deduce her evidence as in the witness statement regarding her analysis, nevertheless this attempt made by the prosecution was disallowed by the learned trial judge as can be seen at p. 74 AR vol. 1: C D

TPR : For the envelope that you receive in 25th May 2012, when the analysis was done by you? E

SP3 : The analysis of the contain for P14 was done by me. I start the analysis on 11th of June 2012 and I complete the analysis on 18th of July 2012.

TPR : From the date you receive the envelope from Insp Amiruddin until the date you done the analysis, where the envelope was kept? F

SP3 : The envelope was kept ...

MAH : TPR this all already in witness statement. I rasa tak perlu tanya soalan ini sebab sudah ada dalam penyata saksi. It repetitions.

[21] After SP3's witness statement was found to be inadmissible for non-compliance with s. 402B(2)(b) of the CPC, what was left on record as regard to the evidence of the chemist regarding her analysis on the impugned drugs was that she received the exhibits from Insp Amiruddin bin Abdullah, the investigating officer (SP14) and that she found the substance to contain 251.66g of methamphetamine after her analysis (see p. 72 of AR vol. 1). We agreed with learned counsel's submission that there was no evidence as to what was the analysis conducted by SP3 before she came to her conclusion. G H

[22] In *Leong Bon Huat v. PP* [1993] 3 CLJ 603; [1993] 3 MLJ 11, on the same issue regarding infirmities in chemist testimony, Edgar Joseph Jr SCJ decided that: I

It is true that the chemist did say that he had conducted a physical examination of the whole of the plant material, by which, we suppose, he meant a visual examination, aided no doubt by microscope. But while the

A result of such an examination might well establish, on the balance of probabilities, that the plant material was cannabis within the meaning of s. 2 of the Act it was necessary to take the matter further and establish beyond any reasonable doubt that was so. This further step would, of necessity, have involved the carrying out of chemical tests on adequate quantities of the plant material. What would be adequate quantities for
B this purpose would depend on the particular circumstances of each case and we do not consider that any useful purpose would be served by laying down any mathematical formula. Suffice it to say, that in the present case, we were not satisfied that the samples of plant material upon which the chemist had carried out the chemical tests were adequate, having regard to the total weight of the plant material, for the reasons stated.
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We note that in the Singapore case of *PP v. Ang Soon Huat*, where one of the contentions advanced by counsel for the accused was similar to that advanced in the present appeal, and where the contention was upheld, the court having reminded itself of the criminal standard of proof, had concluded that where the court was left in doubt as to whether the
D accused has committed an offence in a lower or higher degree of seriousness, the court should make a finding in the lower degree, particularly where a finding in a higher degree will give rise to a mandatory sentence of death.

The result, therefore, was that so far as the charge of trafficking in
E cannabis in contravention of s. 39B was concerned, 'the case against the appellant was not proved with that certainty which is necessary in order to justify a verdict of guilty'. (Per Lord Hewart CJ in *R v. Wallace* applied by Thomson CJ in *Jubri v. PP*.)

Accordingly, we have no option but to allow the appeal, to quash the
F conviction for trafficking in cannabis, to set aside the sentence, and to substitute *in lieu* thereof, a conviction for possession of cannabis in contravention of s. 39A of the Act and a sentence of life imprisonment to take effect from the date of arrest, with the mandatory ten strokes of the rotan.

G **[23]** In the instant appeal before us, in view of the infirmities in the testimony of the chemist, we echoed what was said by His Lordship Edgar Joseph Jr SCJ in the above quoted case that the charge of trafficking was not proved with that certainty.

H **[24]** We now move to ground two of the appeal. It was submitted by learned counsel that the learned trial judge had erred when His Lordship descended into the arena of conflict and cross-examined both the appellant and witness SP4, the taxi driver, regarding the appellant's unconsciousness which is relevant to the question of knowledge. By doing so, the learned trial judge was alleged to have partly usurped the role of the prosecution and had gone beyond s. 165 of the Evidence Act 1950. It was submitted that this is
I a serious misdirection of the learned trial judge.

[25] Section 165 of the Evidence Act 1950 provides: A

> The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form at any time, of any witness or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question: B
>
> Provided that -
>
> (i) the judgment must be based upon facts declared by this Act to be relevant and duly proved; C
>
> (ii) this section shall not authorise any Judge to compel any witness to answer any question or to produce any document which the witness would be entitled to refuse to answer or produce under sections 121 to 131 if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with the primary evidence of any document, except in the cases hereinbefore excepted. D

[26] Learned counsel submitted that the nature of the questions asked by the learned trial judge was in the nature of cross-examination where the answers elicited were in the form of "Yes". Thus, this line of questioning is prejudicial to the appellant. E

[27] From the notes of proceedings at pp. 257-258 of AR vol. 3, we found series of questions put by the trial judge to the appellant. They were as follows: F

> Mah : You paid him with using your currency?
>
> A : Yes.
>
> Mah : Then police took you to police station, then you conscious, you know? G
>
> A : The police put collected money from me I paid to the taxi driver in the police station.
>
> Mah : You are conscious? If you not conscious police took your money, open your trousers you do not know. You know police took your money and paid. You are conscious. Now you want tell me you are not conscious from the airport until Malacca, until police station. Are you said that? H
>
> A : I said that it I loosing conscious from the airport KLIA.
>
> Mah : You loosing conscious until when? I
>
> A : When I first arrived. They gave me a special pass I do not know what I was doing and I spent one day in the airport.

Mah : You reach at the airport what time?

A : I arrived in the morning of 21.5.2012.

Mah : You spent one night or one day. One day means day and night. You sleep there and the next morning you take the taxi?

A : Yes.

Mah : Next morning only you went took the taxi. Dou you slept at the airport?

A : Yes.

Mah : Where you slept at the airport?

A : I slept on the floor at the airport.

Mah : You got your baggage?

A : My bag was in the luggage room.

Mah : What luggage room?

A : Luggage room is who did not go out same day.

Mah : Will you collect your bag or not?

A : I did not collect my baggage.

Mah : You slept there until the next morning?

A : Yes.

Mah : Then you becoming conscious the next morning?

A : Yes.

Mah : And you took the baggage?

A : Yes.

Mah : At the luggage room?

A : Yes.

Mah : So with you baggage your bag. How many bag, one bag or two bag?

A : One bag.

Mah : With your bag you walk out from the airport?

A : Yes.

Mah : You went to taxi already waiting there?

A : Yes.

Mah : You told me that you want to go to Nilai?

A : Yes.

Mah : That time you are already conscious the next morning. Correct or not? A

A : Yes.

Mah : That time you are already conscious all the way until he took you to Malacca?

A : Yes I am conscious. B

Mah : You are argument with taxi driver. You are conscious or not?

A : I was conscious. The taxi driver beat me and become conscious at the police station.

[28] As against SP4, the questions put by the learned trial judge could be seen at pp. 81 - 83 of the AR vol. 1, as follows: C

Mah : Nanti dulu. Encik Wong boleh tak camkan anggota polis itu walaupun tak tahu namanya? Polis yang tanya dengan Encik Wong itu di Jaya Jusco? Di mana perkara itu berlaku? D

SP4 : Bukan di Jaya Jusco tapi di water fall sana.

Mah : Water fall mana ini?

SP4 : Itu dekat sikitlah. Lepas itu Jaya Jusco.

Mah : Means di Simpang Bukit Barulah? E

SP4 : Ya itu Simpang Bukit Barulah. Traffic light itu.

Mah : So kejadian ini berlaku di situlah. Di atas jalan raya lah?

SP4 : Ya.

Mah : Di jalan raya? F

SP4 : Lelaki Nigeria tersebut telah melarikan diri dan saya lari untuk tangkap dia.

Mah : Dia lari Jaya Jusco?

SP4 : Ya. G

Mah : Kamu lari untuk tangkap dia?

SP4 : Ya.

Mah : Means bukan dari kereta?

SP4 : Bukan. H

Mah : Kamu kejar lelaki berkulit hitam itu dari Jaya Jusco?

SP4 : Ya. Sebab saya ada kata dengan dia kalau tak bayar tambang saya akan buat laporan polis. So lelaki kulit hitam itu terus beredar.

Mah : Dia lari kamu kejar, lepas itu orang ramai tangkap dia? I

SP4 : Ya.

Mah : Dekat mana? Dekat air terjun itu ke?

SP4 : Ya, dekat air terjun itu.

Mah : Ok. Dalam kereta peronda itu ada berapa polis?

SP4 : 2 orang polis.

Mah : Itu dalam kereta ada 2 orang polis dan berhenti di air terjun itu?

SP4 : Ya.

Mah : So polis dalam kereta peronda yang keluar di atas sana atau polis lain datang tanya?

SP4 : Yang berada dalam kereta peronda itu. Salah seorang keluar daripada polis yang datang dalam kereta peronda itu.

Mah : Kamu kenal itu polis yang datang tanya dengan kamu? Kamu boleh camkan dia?

SP4 : Tak boleh camkan.

[29] By looking at the notes of proceedings above, we agree with learned counsel's contention that the trial judge had descended into the arena of dispute regarding an element of knowledge of the impugned drugs in the 29 capsules swallowed by the appellant. The appellant's defence was that he swallowed precious stones contained in the 29 capsules. We found that the trial judge had fallen into error in descending into the arena of dispute thereby allowing his judgment of the facts to be clouded by the results of his cross-examination. We agree that the trial judge had exceeded the desirable limits of judicial intervention in the examination and cross-examination of the appellant and SP4 notwithstanding the wide ambit of s. 165 of the Evidence Act 1950.

[30] We found support in our conclusion from the decision of Edgar Joseph Jr SCJ in *Teng Boon How v. PP* [1993] 4 CLJ 545 at pp. 552-553; [1993] 3 MLJ 553 at pp. 563-564, where His Lordship had said:

> … the desirable limits of judicial intervention in the examination and cross-examination of witnesses enunciated in *Yuill v. Yuill* and *Jones v. National Coal Board* would apply in this country. These limits apply with double force in the case of interrogation by a judge of an accused person since, in our view, the nature of examination contemplated by s. 165 of the Evidence Act 1950 is not examination or cross-examination of an inquisitorial nature for the purpose of entrapping an accused, or of extracting from him damaging admissions, upon which to build up a case against him or to supply a gap in the evidence for the prosecution. Especially is this so, in the case of an accused facing a capital charge. We must, therefore, treat the failure of a trial judge sitting alone, to direct himself correctly in accordance with these principles, in the same way as a failure to direct a jury correctly.

[31] We observed that the judgment of the learned trial judge on the issue of knowledge was partly clouded as a result of his cross-examination of the appellant and SP4, the taxi driver. The extracts from His Lordship's judgment clearly show that the learned trial judge had relied on the results of his cross-examination in convicting the appellant (at pp. 31-33 AR vol. 1):

> 49. Keterangan Tertuduh tidak boleh diterima apabila dilihat dari segi perlakuan Tertuduh yang tidak selaras dengan dakwaannya bahawa dia tiada pengetahuan terhadap bahan tersebut sebenarnya adalah dadah kerana:
>
> 49.1 Tertuduh menyorokkan kesemua ketulan dadah dalam perutnya dengan liciknya untuk melepasi atau lari daripada pengetahuan dan penahanan oleh Pihak Berkuasa Malaysia bagi dadah tersebut (lihat kes *Ong Ah Chuan v. Public Prosecutor* [1981] 1 MLJ 64);
>
> 49.2 Sekiranya bahan tersebut yang ditelan oleh Tertuduh benar-benar adalah "Precious Stones" seperti yang didakwanya, Tertuduh sebenarnya tidak perlu membahayakan nyawanya sendiri dengan menelan ketulan berbungkus plastik ke dalam perutnya kerana "Precious Stones" bukan bahan salah atau larangan dan boleh dibawa masuk secara terbuka ke negara ini atau secara membuat deklarasi kepada Pihak Berkuasa; dan
>
> 49.3 Semasa diarahkan oleh Chibike untuk menelan kesemua ketulan tersebut, Tertuduh walaupun mendakwa dirinya dalam keadaan mabuk tetapi masih boleh ingat lagi dia menelannya bersama sup "equsy" bercampur dengan "draw Soup"(?).

[32] The third ground of appeal canvassed by learned counsel was that the appellant had no *mens rea* possession of the drugs. This ground of appeal impinged on the fact that based on the evidence adduced there was great doubt whether the appellant was conscious of his possession. The facts relied by learned counsel was that:

(i) at the time of the arrest the appellant was drinking a bottle of dye;

(ii) when he was brought into the hospital and from the evidence of Dr Cheng Zhe Phang (SP13), the appellant was in a critical state; and

(iii) there was no overt act and no *mens rea* possession in relation to the place of the offence as stated in the charge which is at the hospital.

[33] We agree with learned counsel's contention that the learned trial judge erred when His Lordship did not view the evidence from these angles. It is doubtful that the appellant had the conscious knowledge that he was in *mens rea* possession of the impugned drugs in question when he was admitted to Hospital Melaka.

A **[34]** For various reasons abovestated, we unanimously found that the conviction for trafficking was not safe. We therefore made the following orders:

(i) the appeal was allowed;

B (ii) the conviction of the High Court was set aside; and

(iii) the appellant was convicted under s. 12(2) of the DDA and sentenced to 20 years imprisonment with ten strokes of the mandatory whipping under s. 39A(2) of the DDA.

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